

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35166

STATE OF IDAHO,)	2009 Unpublished Opinion No. 440
)	
Plaintiff-Respondent,)	Filed: April 30, 2009
)	
v.)	Stephen W. Kenyon, Clerk
)	
RAMIRO R. NEVAREZ,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fifth Judicial District, State of Idaho, Minidoka County. Hon. John M. Melanson, District Judge.

Order of the district court relinquishing jurisdiction and sentence, affirmed.

Nevin, Benjamin, McKay & Bartlett LLP, Jeffrey Brownson, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jennifer E. Birken, Deputy Attorney General, Boise, for respondent.

GRATTON, J.

In this case we are asked to determine whether the district court abused its discretion in refusing to grant probation following a period of retained jurisdiction. We are also asked to review a unified sentence of twenty-five years with seven years determinate for robbery. We affirm.

Ramiro R. Nevarez pled guilty to one count of robbery. Idaho Code §§ 18-6501, 18-6502(2) and 18-204. Following his plea, Nevarez was sentenced to twenty-five years with seven years determinate. The district court retained jurisdiction for 180 days, and Nevarez was sent to participate in the rider program at the North Idaho Correctional Institution (NICI).

After Nevarez completed evaluation at NICI, the jurisdictional review committee recommended probation. The district court, however, relinquished jurisdiction. Nevarez appeals, claiming that the district court erred by refusing to grant probation in light of the recommendation of the jurisdictional review committee. He also argues that the sentence of

twenty-five years with seven years determinate is excessive and constitutes an abuse of discretion.

We note that the decision to place a defendant on probation or whether, instead, to relinquish jurisdiction over the defendant is a matter within the sound discretion of the district court and will not be overturned on appeal absent an abuse of that discretion. *State v. Hood*, 102 Idaho 711, 712, 639 P.2d 9, 10 (1981); *State v. Lee*, 117 Idaho 203, 205-06, 786 P.2d 594, 596-97 (Ct. App. 1990).

The record in this case shows that the district court properly considered the information before it and determined that probation was not appropriate. We hold that Nevarez has failed to show that the district court abused its discretion, and we therefore affirm the order relinquishing jurisdiction.

Nevarez also contends that the unified sentence of twenty-five years with seven years determinate, is excessive and constitutes an abuse of discretion. Sentences are reviewed for an abuse of discretion. Our appellate standard of review and the factors to be considered when evaluating the reasonableness of a sentence are well-established. *State v. Burdett*, 134 Idaho 271, 1 P.3d 299 (Ct. App. 2000); *State v. Sanchez*, 115 Idaho 776, 769 P.2d 1148 (Ct. App. 1989); *State v. Reinke*, 103 Idaho 771, 653 P.2d 1183 (Ct. App. 1982); *State v. Toohill*, 103 Idaho 565, 650 P.2d 707 (Ct. App. 1982). When reviewing the length of a sentence, we consider the defendant's entire sentence. *State v. Oliver*, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007).

Nevarez argues that all of the relevant goals of sentencing could have been accomplished with probation. As noted above, however, the district court found that probation was not an appropriate course of action in Nevarez's case. The record does not indicate that the district court abused its discretion in this case. Accordingly, the sentence is affirmed.

The order of the district court relinquishing jurisdiction and Nevarez's sentence are affirmed.

Judge PERRY **CONCURS.**

Judge GUTIERREZ, **SPECIALLY CONCURRING.**

I write separately to emphasize that my affirmance of the district court's sentencing and relinquishment of jurisdiction decisions is based primarily on what is not in the record on appeal as opposed to what the record reflects.

The district court, in relinquishing jurisdiction, grounds its decision on the fact that the offense of robbery is a crime of violence and on the fact that Nevarez committed several rule violations while on the rider program for which he received informal disciplinary sanctions. Acknowledging that Nevarez did the programming, the district court nevertheless relinquished jurisdiction, taking into consideration the most important goal of sentencing, which is protection of society.

The record reflects that the addendum to the presentence investigation (APSI) recommended probation for this twenty-one-year-old first-time felon, indicating Nevarez was *not* a significant disciplinary problem, completed assigned programs, including obtaining his GED, submitted what appeared to be a reasonable probation plan, and his efforts in the program appeared to become increasingly sincere regarding his willingness to change his criminal thinking and behavior.

The record further reflects that after an initial bond set at \$50,000, Nevarez was released on his own recognizance by the magistrate nearly a year before sentencing took place. After Nevarez failed to appear at the pre-trial conference, another district judge issued a bench warrant setting bond at \$100,000. Later, that same district judge reduced the bond to \$2,500. Nevarez bonded out and was released until sentencing when he was placed on a rider.

Nevarez's risk to society, based on the record, appears to be at odds with the district court's decisions in sentencing and in relinquishing jurisdiction. Because the district court is granted discretion to grant or deny probation and to modify the original sentence if jurisdiction is relinquished, the district court presumably relied on more than just the APSI. Here, the sentencing hearing transcript and the original presentence investigation are missing from the record on appeal. Missing portions of the record are presumed to support the district court's findings and actions. *State v. Sima*, 98 Idaho 643, 644, 570 P.2d 1333, 1334 (1977); *State v. Ripici*, 122 Idaho 538, 541, 835 P.2d 1349, 1352 (Ct. App. 1992). Consequently, as a matter of procedure, the district court's exercise of its discretion must be affirmed on appeal.